Mohamed Taufiq Teng Abdullah & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Anor (Lynas Corp Ltd & Anor, intended interveners)

HIGH COURT (KUANTAN) — APPLICATION FOR JUDICIAL REVIEW NO 25NCVC-23–12 OF 2012
MARIANA YAHYA J
15 APRIL 2013

Civil Procedure — Parties — Intervention — Application to intervene in judicial review proceedings — Leave to intervene given in earlier related proceedings — Earlier decision followed — Whether interveners necessary and proper party — Whether interveners having direct interest in matter and adversely affected by any decision

The applicants had applied for leave to file for judicial review under O 53 r 3(1) of the Rules of Court 2012. The applicants sought orders, inter alia, to quash the decision of the respondents in issuing the temporary operating license ('TOL') in favour of Lynas Advanced Materials Plant ('LAMP'). The proposed interveners applied to intervene and to be added as a party in the judicial review proceedings. The court had made a decision on the issue of intervention earlier in related Suits No 25NCVC-17–7 of 2012 and No 25NCVC-18–7 of 2012 ('the earlier suits').

Held, allowing the proposed interveners' application with costs in the cause:

(1) The intervening application was indistinguishable and bore a striking resemblance to the earlier suits. Even counsel appearing for the respective parties were the same counsel in the earlier suits. It was so parallel and alike that it could very well be combined with the earlier suits and it would not have made any difference. The court is bound by its own decision. This is to ensure consistency and to avoid legal pandemonium where the same court of law in determining the very same issue in a short span of time assisted by the same counsel makes two conflicting decisions (see para 6).

(2) Having made the decision in allowing the interveners' application in the earlier suits, the court adopted the same grounds in this action (see para 7).

(3) The proposed interveners were a necessary and proper party who had a direct interest in the matter and were adversely affected by the decision of this judicial review proceeding. The inclusion of the proposed interveners as parties was necessary as they were directly affected by the applicants' application (see para 8).

A **[Bahasa Malaysia summary**

Pemohon-pemohon telah memohon untuk izin memfailkan semakan kehakiman di bawah A 53 k 3(1) Kaedah-Kaedah Mahkamah 2012. Pemohon-pemohon memohon perintah, antara lain, membatalkan keputusan
B responden-responden dalam mengeluarkan lesen operasi sementara ('TOL') memihak Lynas Advanced Materials Plant ('LAMP'). Pencelah-pencelah yang dicadangkan memohon untuk mencelah dan dimasukkan sebagai pihak di dalam prosiding semakan kehakiman. Mahkamah telah membuat keputusan atas isu mencelah terdahulu di dalam Guaman No 25NCVC-17-7 Tahun
C 2012 dan No 25NCVC-18-7 Tahun 2012 ('guaman terdahulu').

Diputuskan, membenarkan permohonan pencelah-pencelah yang dicadangkan dengan kos dalam kausa:

D (1) Permohonan mencelah tidak dapat dibezakan dan mempunyai persamaaan yang ketara kepada guaman terdahulu. Peguam yang mewakili pihak-pihak masing-masing adalah juga peguam yang sama dalam guaman terdahulu. Ia adalah selari dan sama bahawa ia boleh digabungkan dengan guaman terdahulu dan ia tidak akan membuat
E apa-apa perbezaan. Mahkamah terikat dengan keputusannya sendiri. Ini untuk memastikan kekonsistenan dan mengelakkan huru-hara undang-undang di mana mahkamah undang-undang yang sama dalam menentukan isu yang sama dalam tempoh yang singkat dibantu oleh peguam yang sama membuat dua keputusan bercanggah (lihat
F perenggan 6).

(2) Dengan membuat keputusan dalam membenarkan permohonan pencelah-pencelah dalam guaman terdahulu, mahkamah mengguna alasan yang sama dalam tindakan ini (lihat perenggan 7).

G (3) Pencelah-pencelah yang dicadangkan adalah perlu dan pihak yang betul yang mempunyai kepentingan terus dalam perkara tersebut dan terjejas dengan keputusan prosiding semakan kehakiman ini. Kemasukan pencelah-pencelah yang dicadangkan sebagai pihak-pihak adalah perlu kerana mereka terjejas secara terus oleh permohonan
H pemohon-pemohon (lihat perenggan 8).]

Notes

For cases on intervention, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5941–5989.

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Legislation referred to

Atomic Energy Licensing Act 1984 s 32, 32(5)
Rules of Courts 2012 O 15, O 53 r 3(1), 3(5)
Rules of the High Court 1980

(Bastian Vendragon) for the applicant.
(Attorney General's Chambers) for the first and second respondents.
(Jeff Leong, Poon & Wong) for the third and fourth respondents.

Mariana Yahya J:

FACTS OF THE CASE

Application for judicial review under O 53 r 3(1) of the Rules of Court 2012

[1] The applicants in this case had on 3 December 2012 filed an ex-parte application for leave to make an application for judicial review under O 53 r 3(1) of the Rules of Court 2012.

In the leave application, the applicants prayed for the following:

(a) for a leave to be granted to apply for an order of certiorari for the purpose of quashing the decision of the above named first respondent and/or the second respondent in issuing the temporary operating license ('TOL') on 3 September 2012 in favour of lynas advanced materials plant ('LAMP');

(b) for a declaration that the TOL granted in invalid and void;

(c) for a leave to be granted to apply for an order of certiorari for the purpose of setting aside and quash the decision off the second respondent in issuing the temporary operating license (TOL) on 3 September 2012 in favour of lynas advanced materials plant (LAMP), despite the current and on-going judicial review proceedings at the Kuantan High Court in the case of Kuantan High Court Judicial Review No 25NCVC-17–7 of 2012 and No 25NCVC-18–7 of 2012 challenging the decision of the second respondent dated 3 September 2012 that has been affirmed subject to additional condition by the first respondent on 13 June 2012.

(d) for a leave to be granted for an order of certiorari for the purpose of setting aside and quashing the decision of the above named first respondent on 13 June 2012 in disallowing/dismissing the appeal of Ismail bin Abu Bakar, Abujavalli a/p Raman and Tan Ah Meng with the imposition of two additional conditions which further reaffirms the decision of the second respondent on 30 January 2012 granting the TOL to Lynas Malaysia Sdn Bhd, subject to five operational conditions towards Lynas advanced material plants ('LAMP') at Gebeng, Kuantan.

(e) for a leave to be granted for a prohibitory order prohibiting the first

respondent from issuing any license; temporary or permanent to Lynas Malaysia Sdn Bhd except and until:

(i) Lynas Malaysia Sdn Bhd provide a detailed environmental impact assessment report ('DEIA') to the second respondent and subject to the approval of DEIA by the director of the environmental ('DOE');

(ii) Lynas Malaysia Sdn Bhd to provide a new radiological impact assessment report to the second respondent for its approval; and

(iii) Lynas Malaysia Sdn Bhd to provide new proposals for safety case for radioactive waste disposal ('SCRWD') and radioactive waste management plan ('RWMP') to the second respondent for its approval made in pursuant to the proposals by the International Atomic Energy Agency in its report dated 30 June 2011.

(f) that the TOL be stayed pursuant to O 53 r 3(5) of the Rules of Court 2012 and/or inherent jurisdiction of this honourable court pending the disposal of this proceeding;

(g) for a declaration that the Minister had exhibited a real likelihood of bias in favour of the LAMP project and therefore ought not to have adjudicated any appeals of the decision of the AELB in granting the TOL to the LAMP project pursuant to s 32 of the Atomic Energy Licensing Act 1984 ('ALEA');

(h) for a declaration that the Minister had acted in excess of jurisdiction and the ouster clause in s 32(5) of the AELA 1984 is of no effect;

(i) any extension of time to be granted (if need be) to commence this judicial review proceeding in accordance with the Rules of the High Court 1980;

(j) costs; and

(k) any other additional reliefs deems fit and proper by this honourable court.

DECISION

[2] The application to be determined by this honorable court is:

The Application by the Proposes Interveners' to intervene and to add as a party in the Judicial Review proceedings that is Encl 6

The issue in this application is whether the proposed interveners are allowed to intervene and become party in this judicial review proceeding.

[3] The application to intervene in encl 6 was fixed for hearing on

18 December 2012. However, one of the counsel in charge for this matter was not present as he was occupied in the Federal Court in Putrajaya for another hearing and counsels for the applicant seek for an adjournment from this court to fix a new date for the hearing. Apart from that, counsel for the applicant reasoned that adjournment of this hearing is proper because there is a preliminary objection filed by the attorney general's chambers and the said preliminary objection ought to be heard and disposed first before the application for intervene is to be heard because if the court is to allow the preliminary objection, it would render this application to be academic and would have waste valuable court's and parties' time.

[4] However, counsel for the proposed interveners' objected to any adjournment as they have filed this interveners' application since 21 December 2012 and have served the same to the applicants on the same date. In addition, this application is fixed for hearing and the proposed interveners' had even filed and served their written submissions to the applicants. Counsel for the applicant reiterate their stand again and again that an adjournment purely on the reason that the main counsel in charge is having another matter in a different court should not be entertained by this court. Further, this court has made a decision on the issue of intervention earlier in Suits No 25NCVC-17–7 of 2012 and No 25NCVC-18–7 of 2012 and the court is bound by its own decision.

[5] Counsel for the respondents have no objection to the application to intervene by the proposed interveners.

[6] Having heard all parties, the court is of the view that this intervening application is indistinguishable and bears a striking resemblance to the previous two judicial review applications (Suits No 25NCVC-17–7 of 2012 and No 25NCVC-18–7 of 2012) that has already been decided by this court. Even counsel appearing for the respective parties are the same counsel in the other two judicial review applications. It is so parallel and alike that this court is of the opinion that it could very well be combined with the other two judicial review applications and it would not have made any difference. Having said that, the court is bound by its own decision. This is to ensure consistency and to avoid legal pandemonium where the same court of law in determining the very same issue in a short span of time assisted by the same counsel is making two conflicting decisions.

[7] Therefore, having made the decision in allowing the interveners' application in Suits No 25NCVC-17–7 of 2012 and No 25NCVC-18–7 of 2012, I shall adopt the same grounds in the aforementioned suits for this action and it is as follows:

The reliefs claimed by the applicants in the judicial review application are as follows;

[3] Application by the proposed interveners' to intervene and to add as a party in the judicial review proceedings (Encl 16A)

Issues - Whether the proposed interveners are allowed to intervene and become a party in the judicial review proceedings.

The reliefs claimed by the applicants in the judicial review application are as follows;

[3.1] That the applicants be granted leave to apply for an order of certiorari for the purpose of quashing the decision of the above name first respondent made on 13 June 2012 disallowing the appeal of Ismail Abu Bakar, Abujavalli a/p V Raman and Tan Ah Meng, with the imposition of two additional conditions thus affirming the decision of the second respondent made on the 30th of January 2012 granting a temporary operating licence ('TOL') to Lynas Malaysia Sdn Bhd subject to 5 conditions for the operation of the Lynas Advanced Materials Plant (LAMP) in Gebeng, Kuantan;

[3.2] That the applicant be granted leave to apply for an order of prohibition, prohibiting the first respondent from issuing any temporary or permanent license to Lynas Malaysia Sdn Bhd unless and until:

(a) Lynas Malaysia Sdn Bhd submits a detailed environment impact assessment ('DEIA') report to the second respondent and subject to the approval of the DEIA by the Director General of the Department of Environment ('DOE'); and

(b) Lynas Malaysia Sdn Bhd submits fresh radiological impact assessment (RIA) report to the second respondent for its approval; and

(c) Lynas Sdn Bhd submits a fresh Safety Case for Radioactive Waste Disposal ('SCRWD') and Radioactive Waste Management Plan ('RWMP') proposals to the 2nd Respondent for its approval made pursuant to the recommendation of the International Atomic Energy Agency ('IAEA') report dated 30 June 2011.

[3.3] That the said TOL be stayed, pursuant to O 53 r 3 (5) and/or under the inherent jurisdiction of this court pending the determination of these proceedings.

[3.4] A declaration that the Minister had exhibited a real likelihood of bias in favour of LAMP project, and therefore ought not to have adjudicated on any appeal against the decision of the AELB to grant the TOL to the LAMP project pursuant to s 32 AELA 1984;

[3.5] A declaration that the Minister had acted in excess of jurisdiction, and the ouster clause in s 32 (5) AELA 1984 is of no effect;

[3.6] Any extension of time be granted (if need be) to initiate these judicial review proceedings pursuant to the Rules of the High Court 1980.

[4] I will start with the submission of the counsel for the applicants in the judicial review proceeding. The counsel submits that there is no right in persons to intervene and to be added as respondents as applied for by the proposed interveners pursuant

to O 15 Rules of Courts 2012 or the inherent jurisdiction of court. It is argued that there are special provisions available to appear and to be heard in judicial review proceedings that is under O 53 r 8 Rules of Courts 2012. O 53 r 8 provides;

(a) Persons directly affected by the application for judicial review shall be served with Form 110 and cause papers (O 53 r 4 (2));

(b) Persons not served but who desire to be heard, may at the discretion of the Judge be heard (O 53 r 8(1)) The above special provisions of O 53 Rules of Courts 2012 govern the rights of parties and persons directly affected. To support the applicants' contention, counsel has referred to a case of *Majlis Ugama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307 where the FCT held at p 308 that;

Held (2)

O 53 r 8(1) of RHC specifically catered to persons who claimed an interest in the proceedings and who wished to oppose it. As a specific rule was put in place for a judicial review proceedings, the more general basis for intervention under O 15 r 6(2)(b) of RHC cannot be invoked.

Held (4)

As there is a specific provision in O 53 r 8(1) of RHC, the inherent jurisdiction of the court could not be invoked to override the application of specific rule.

[5] Counsel for the applicants further submits that the law is very clear as it stands that O 53 r 8 (1) had already provides a person who desire to be heard in opposition to the judicial review application and appears to the Judge to be a proper person to be heard, may be heard notwithstanding that he has not been served with the cause papers in the matter. A person who desire to be heard in opposition to the judicial review application will not automatically be a party until and unless our Rules provides for persons directly affected or persons interested to become parties, then there is no right to be a party. The Rules of Courts 2012 were just amended and still there is no provision in O 53 which provides that a proper person who is opposing the application be made a party. The best simple words that can be said here is that you can be heard but you cannot be a party.

[6] Counsel for the proposed interveners submits that the proposed interveners is the recipient of the TOL approval which is now being challenged by way of judicial review. The proposed intervener is directly involved in TOL approval and would directly be affected by the outcome of the judicial review proceedings. Hence, they do not want merely to appear as an interested party to address the issues but to be a party as such. The affidavits filed by the proposed intervener had deliberately showed that the position of proposed intervener in the judicial review application as person directly affected particularly the validity and/or affect the TOL which was issued to none other than the proposed intervener. The proposed interveners have a clear, substantive, pecuniary and direct interest in the approval of the TOL for the LAMP project as both these proposed interveners have invested time, monies and effort in ensuring the LAMP Project complies with all the relevant local laws and both local and international standards to meet the condition needed to be granted

the TOL. The decision of this court with respect to the applications filed and prayers therein would therefore clearly and directly affect the interest of the proposed interveners.

[7] The facts laid down by the proposed interveners had justified and satisfied the court that they are a proper person' referred to under O 53 r 8(1) and a person who has a direct interest. Both parties had referred to the case of *Advance Synergy Capital Sdn Bhd v The Minister of Finance, Malaysia & Anor* [2011] 7 CLJ 557 and *Majlis Agama Islam Selangor v Bong Boon Chuen & others* [2009] 6 MLJ 307. Counsel for the proposed intervener submits that the proposed intervener can be granted leave to intervene as a respondent in the judicial review proceeding even at the leave stage provided the proposed intervener succeeded in proving that they have satisfied the court that they are the proper person who has a direct interest and directly affected. Justice Low Hop Bing JCA in his judgment at para 25 p 569 said that;

There is no plausible reason to exclude a proper party or person to be granted leave to intervene as a respondent at the leave stage. In such circumstances, inclusivity rather than exclusivity should be the norm, so as to ensure fairness to the party who has a direct interest in the matter.

Justice Low went on saying at para 26 at p 569:

In addition, O 53 r 8(1) confers upon the judge a wide discretion to hear a proper party or person in opposition to an 'application for judicial review' so long as the conditions contained therein have been fulfilled, viz:

(1) The person desires to be heard in opposition to the application; and

(2) That person appears to the judge to be a proper person to be heard,

Notwithstanding that he has not been served with the cause paper in the matter.

Justice Low Hop Bing also made reference to Majlis Agama Islam Selangor case where in his judgment at para 23 said that,

In *Majlis Agama Islam Selangor v Bong Boon Chuen & others*, Justice Zulkefli FCJ explained at p 319 [26] that a proper person or party who has a direct interest maybe joined as a party. The well-considered judgment of His Lordship refers to the 'joinder as a party injudicial review' proceedings. However, the parties before the Federal Court did not address the question of whether the 'judicial review' proceedings refer to the two stages or to first stage only ie, either the threshold stage or the substantive stage.

Counsel for the proposed intervener submits that it is wrong for the applicant to say that O 53 r 8 does not confer joinder of parties upon this court to grant intervention and it is also incorrect to say that a proper person or party who has the direct interest maybe joined as a party.

[8] Counsel for the applicant also states his views on the decision of the Court of Appeal in *Advance Synergy*'s case which purports to say that you can intervene in judicial review proceedings at any stage and made a reference to the Federal Court

decision in Majlis Agama Islam case but failed to appreciate the principles applicable and what the decision was about and went on the wrong part of the aspect. My observation is that the Federal Court decision talks about the general and specific provision in the Rules of the High Court 1980. When you have a specific provision for a particular matter then you cannot invoke the general provision on that matter. O 15 r 6(2)(b) and O 53 was referred and discussed in that case unlike the Advance Synergy case only confine the applicability of O 53 in a judicial review proceeding and O 15 r 6 (2)(b) was not referred at all. More importantly is that, at present there is no other case authority to say that the Court of Appeal decision was wrong and bad in law.

[9] The arguments put by the applicants' counsel is that persons directly affected or persons directly interested in a judicial review proceedings could not be a party because there is no provision of 'be a party' in O 53 r 8 itself and yet they have the right in accordance with procedural fairness, natural justice to be heard fully I am of the view that O 53 r 8 is itself silent about provision of 'be or is a party' even though they are allowed to be heard. Is it a 'must' to have the word 'be a party' in O 53 r 8, then you can be a party? What would then be the position of this proper person's legal rights if the outcome of the proceedings is not in their favour? And again, the Rules also silent on this. Since the provision is silent in this matter, there are some doubts that to be cleared and, the court should not limits its power to exercise its inherent powers to remove the doubt and to make any order as maybe necessary to prevent injustice or to prevent an abuse of the process of the court. In such circumstances, I would say that, I am not with the submission of the applicants' counsel.

[10] After having considered the proposed interveners' application for leave to intervene, the submissions by parties, I conclude that the proposed interveners are a necessary and proper party who have a direct interest in the matter and adversely affected by the decision of this judicial review proceedings. In the context herein, justice and fairness dictate the necessary inclusion of the proposed interveners as a party to canvass their opposition on a subject matter directly affecting their interest. O 53 r 8 (1) can therefore be invoked to allow the proposed intervener to appear as a party to oppose the applicants' application in this judicial review proceedings. I therefore allowed the proposed interveners' application encl 16A with cost in the cause.

[8] Thus, this court decides that the proposed interveners are a necessary and proper party who have a direct interest in the matter and are adversely affected by the decision of this judicial review proceeding. The inclusion of the proposed interveners as parties is necessary as they are directly affected by the

applicants' application. As such, I allowed the proposed interveners' application in encl 6 with costs in the cause.

Proposed interveners' application allowed with costs in the cause.

Reported by Kanesh Sundrum